

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website ([legis.state.nm.us](http://legis.state.nm.us)). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

ORIGINAL DATE 2/3/08

SPONSOR Taylor LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Certain Scholarships Donation Tax Credit SB 462

ANALYST Francis

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY08	FY09	FY10		
		(\$4,800.0)	Recurring	General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

### SOURCES OF INFORMATION

LFC Files

Arizona Department of Revenue (<http://www.azdor.gov/researchstats/schooltaxcredit.htm>)

#### Responses Received From

Public Education Department (PED)

### SUMMARY

#### Synopsis of Bill

Senate Bill 462 creates a new personal and corporate income tax credit for contributions to scholarship granting organizations called the "Equal Opportunity Scholarship Tax Credit." The maximum credit is \$500 for an individual or \$1,000 for married taxpayers. The taxpayer cannot claim a credit if the taxpayer has already itemized the contribution on his or her federal return and the credit is only good against current year tax liability. There is no maximum credit if it is claimed against corporate income tax liability.

A scholarship granting organization (SGO) must be a 501(c)(3) nonprofit and notify Taxation and Revenue Department (TRD) of its intention to begin granting scholarships. 90 percent of the SGO's revenue from contributions must be spent on educational scholarships and all revenue from interest or investment earnings must be spent on educational scholarships. The scholarships the SGO awards must be portable, going to any qualified school that accepts the eligible student. The SGO cannot award scholarships to students of the SGO's paid staff, board

members or relatives of paid staff or board members. Each year the SGO must report publicly to TRD the total number and dollar amount of contributions received during the previous year and total number and dollar amount of scholarships. The SGO must provide scholarships to more than one qualifying school.

Qualifying schools must comply with all health and safety laws or codes that apply to nonpublic schools, certify that it will not discriminate on the basis of race, national origin, or ethnicity, and provide regular student performance reporting to the parent(s) and require students to take an annual academic test. The school must operate in New Mexico and fill spaces by a random selection process (except for siblings of enrolled students and previously enrolled scholarship students) if there are more students than spaces.

An eligible student is a member of a household whose total annual income does not exceed an amount used to qualify for a reduced price lunch program and who resides in New Mexico while receiving the scholarship. Once eligible, however, the student remains eligible until graduation or the student reaches 21 years of age.

TRD must promulgate rules and create the appropriate receipt for SGOs to deliver to contributors. TRD is expressly given audit authority and can ban an SGO from participation if it finds the SGO has intentionally and substantially failed to comply with the requirements.

The credit is available in tax years 2009 through 2012.

## **FISCAL IMPLICATIONS**

The State of Arizona has a similar credit to the one proposed here except that the Arizona personal income tax credit does not have a low income requirement (though the Arizona CIT credit does have a low income requirement). Extrapolating from data from the Arizona Department of Revenue, it is estimated that 3,340 New Mexican taxpayers will donate an average of \$692 per return (which includes both individuals and married taxpayers) and reduce general fund revenue by \$2.3 million. The estimate for the CIT credit is that 30 firms will donate an average of \$83,500 each for a net reduction in general fund revenue of \$2.5 million. Total impact is a reduction of \$4.8 million per year.

Since the credit is not allowed until tax year 2009, there is no impact for FY09 because returns will not be filed until the second half of FY10.

## **SIGNIFICANT ISSUES**

PED raises important legal questions:

Because the bill does not restrict the availability of the credit if the 501(c) (3) charitable organization primarily supports private religious schools, the state may find itself indirectly supporting private religious schools by permitting corporate and individual taxpayers to take this credit. This implicates the Establishment Clause (1st Amendment) of the federal Constitution. It bears observation that this bill defines a qualified school as one that does not discriminate on the basis of a student's race, national origin or ethnicity, noticeably omitting religion or gender, and that qualified schools may not have admissions standards, as many secular private schools do. The language in the bill does not reflect all three prongs of the test for determining Establishment Clause violations,

which were laid down by the Supreme Court in *Lemon v. Kurtz*, 403 U.S. 602 (1971).  
But see:

- On January 29, 1999, the New Mexico Attorney General Opinion 99-01 opined that “A school voucher program involving the use of public money to provide parents of private school children with tuition assistance raises serious and substantial state constitutional questions, most significantly under Article XII, Section 3, which proscribes the use of public money for the support of private schools, and the anti-donation clause of Article IX, Section 14.”
- In November 27, 2006, the U.S. Supreme Court refused to hear a challenge (by a writ of certiorari) to an April 2006 decision of the Maine Supreme Judicial Court that upheld a Maine law that prohibited the use of public funds to send students to private religious schools.
- *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (The Supreme Court upheld an Establishment Clause challenge against an Ohio pilot scholarship program that sought to give aid primarily to families below the poverty line with children at a failing school district so they could choose to either attend another public or private school, receive tutorial assistance, enroll in a magnet school or receive a scholarship.)
- *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970) (The Supreme Court upheld the city’s granting of property tax exemptions to religious organizations for properties used solely for religious worship, which was authorized by the state constitution and the implementing statute providing for tax exemptions for property used exclusively for religious, educational or charitable purposes.)
- *Mueller v. Allen*, 463 U.S. 388 (1983) (The Supreme Court upheld a Minnesota law that allowed state taxpayers, in computing their state income tax, to deduct expenses incurred in providing "tuition, textbooks and transportation" for their children attending an elementary or secondary school and was challenged on the basis that it violated the Establishment Clause.)
- *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (“The system of providing income tax benefits to parents of children attending New York's *nonpublic schools* also violates the Establishment Clause because, like the tuition reimbursement program, it is not sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.”) (emphasis added)
- *Byrne v. Public Funds for Public Schools of New Jersey*, 442 U.S. 907 (1979) (The Supreme Court summarily affirmed a lower federal court holding that a state tax deduction for taxpayers with children attending nonpublic school violated the Establishment Clause.)
- *Franchise Tax Board of California v. United Americans for Public Schools*, 419 U.S. 890 (1974) (The Court summarily affirmed a lower federal court judgment that struck down a state statute providing income-tax reduction for taxpayers sending children to nonpublic schools.)

- *Hibbs v. Winn*, 542 U.S. 88 (2004) (Despite the federal Tax Injunction Act that prohibits federal courts from restraining the implementation of state tax laws, the Supreme Court here allowed Arizona taxpayers to proceed, on the basis of violation of the Establishment Clause, in a suit seeking to enjoin the operation of an Arizona tax law that authorizes an income tax credit for payments to nonprofit “state tuition organizations” that awards scholarships to students in private elementary/secondary schools including those attending religious-based schools.)

Another possible consequence of this bill might be that while it would provide a reduction of taxes for taxpayers who donate to scholarship organizations, it might provide an incentive for parents to enroll their child or children in a private school, thus reducing public school enrollment. It should be noted that the school choice provision of the Assessment and Accountability Act [§22-2C-7(E)] favors a student’s choice to attend a higher ranked *public* school if the student’s public school fails to make adequate yearly progress for two or more consecutive school years.

NF/nt